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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1138

JACK HENSLEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JAMES R. KIRKLAND,
M. EDWARD BUCKLEY,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioner, Jack Hensley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered February 10, 1947 (R. 64) affirming petitioner's conviction for unlawful possession of marihuana under Title 26 U. S. C. A. Section 2593, Marihuana Tax Act of 1937.

Opinion Below

The opinion in the Court of Appeals is not yet reported, but is set out in full in the Record at page 64.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 A of the Judicial Code as Amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347) and Sec. 269, as

amended (28 U. S. C. A. 391). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Question Presented

The Court erred in omitting to rule that an incarceration in the penitentiary, following a plea of guilty in a Federal Court, and service therein for twenty-seven days, divested the Court of power to vacate the commitment and permit the Government to proceed with a new indictment, based upon two counts of the first indictment, which had been *nolle prossed* by the Government at the time of the imposition of the original sentence.

Statutes Involved

Marihuana Tax Act of August 2, 1937, Title 26, U. S. C. A. Sec. 2593:

> "2593. Unlawful possession.
>
> (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by the section 2590 (a).

Statement

Petitioner was indicted December 21, 1942, in Criminal Case No. 71,133 (App. 3) in the October Term, 1942. He was sentenced on June 4, 1943, following a plea of guilty to the third count thereof charging unlawful possession on November 4, 1942 of 125 grains of marihuana. The first

count, charging an unlawful transfer of 48 ounces of marihuana on October 30, 1942, to narcotic agent Benjamin Groff, and the second count charging an unlawful transfer of marihuana to the said narcotic agent Benjamin Groff on November 4, 1942, consisting of 940 cigarettes and 48 ounces of marihuana were *nolle prossed* by the Government. *Thereafter, and over his objection, the trial court, on July 1, 1943, after the appellant had served twenty-seven days of imprisonment, vacated the order and on the motion of Government counsel, the third count of the indictment was dismissed, and exception thereto was duly noted.* This important fact was apparently overlooked in the opinion rendered by the United States Court of Appeals.

Later, indictment No. 72,270 was returned in the July Term, 1943 (App. 9), and contained eight counts. The first count charged that on October 30, 1942, the defendant had transferred to the same narcotic agent, Benjamin Groff, the same 48 ounces of marihuana; in the second count that he was an unauthorized transferee of the said 48 ounces of marihuana; in the third count that he was on the same date a person who had unlawfully failed to register with the *Collector of Internal Revenue for the District of Columbia* (Italics supplied) and without having paid a special tax required by Sec. 3234(a) of the Internal Revenue Code; and the fourth count charged that on the same date he had failed to pay the special tax and to register as required, and had unlawfully delivered 48 ounces of marihuana. The succeeding fifth, sixth, seventh and eighth counts charged similar offenses on the fourth day of November, 1942, and involved the same narcotic agent, as well as the same 940 cigarettes and 48 ounces of marihuana.

A Government bill of particulars limited the proof on the third and seventh counts of the second indictment to allegations of sales. The question of former jeopardy was raised (App. 18, 21, 26). By demurrer, the appellant successfully

vacated the third and seventh counts of the indictment by virtue of the fact that the proper person with whom registration under the Act was to be made was the Deputy Collector of Internal Revenue for the District of Maryland. The trial Court, over the objection of appellant, permitted the Government to offer testimony of the seizure at his home, under a search warrant, of 125 grains of marihuana, measuring scales, and some cigarette papers in the absence of a count in the indictment, covering such seizure and which had formerly been the basis of the third count of the first indictment on which the appellant had entered a plea of guilty and had been committed to the penitentiary. Judgments of acquittal on the second and sixth counts were granted to the appellant on his motion at the close of the Government's case (App. 27). The prosecutor's requests to the Court to dismiss counts four and eight in the indictment and to strike out the evidence obtained as a result of the search of defendant's home were granted.

On the remaining first and fifth counts of the indictment, which charged unlawful transfer of marihuana on October 30, 1942, and November 4, 1942, on which Deputy Collector of Internal Revenue Andrew J. Clarke did not make a demand for the official transfer forms of appellant until April 17, 1944, the jury returned verdicts of guilty. This action occurred approximately three years after the second indictment and almost four years after the offenses were committed. The Government's testimony tended to prove the allegations of the indictment, and the appellant stood upon his legal rights and did not testify in the case.

Appellant's motion for a new trial and/or arrest in judgment (App. 32) was overruled. He was sentenced to a term of one to three years on the first count and a similar sentence on the fifth count to run concurrently, which was the exact sentence imposed on him by the Court in the first indictment, after which the present appeal was instituted.

Reasons for Granting the Writ

The major contention of the petitioner is that his twenty-seven days of service under a valid commitment divested the trial court of its jurisdiction, over petitioner's objection, to arbitrarily vacate the judgment. Since jeopardy attached when his sentence was imposed and his service began, his subsequent conviction for the transactions covered by those counts of the first indictment, which were *nolle prossed* by the prosecutor, which action was inextricably associated with his plea of guilty, constituted double jeopardy under the Fifth Amendment of the Constitution.

Speaking for a unanimous court, Chief Justice Taft stated the applicable rule in *United States* v. *Murray* (1927), 275 U. S. 347, 72 L. Ed. 309, 48 S. Ct. 146, as follows:

> "The beginning of the service of a sentence in a criminal case ends the power of the court, even in the same term, to change it. • • • It is true there was but one day of execution of the sentence in the Murray case, but the power passed immediately after imprisonment began and there had been one day of it served."

See also *Ex Parte Lange,* 18 Wall. 163, 21 L. Ed. 872.

The rule was also announced in *Stewart* v. *United States* (1924), 300 F. 769, as follows:

> "An examination of the authorities leaves no doubt that the established rule is that courts have the jurisdiction and authority, during the term in which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, until or unless they have been executed in whole or part, or the rights of third parties will be injured by such action, and cases in which pleas of nolle contendere have been filed and accepted by the court are not exceptions to this rule. See *Basset* v. *U. S.,* 9 Wall. (76 U. S.) 38, 39, 41, 19 L. Ed. 548; *Tiberg* v. *Warren,* 192 F. 458, 460, 461, 463, 112 C. C. A.

596; *Ex Parte Lange,* 18 Wall. (85 U. S.) 163, 167, 21 L. Ed. 872; *Goddard* v. *Ordway,* 101 U. S. 745, 752, 25 L. Ed. 1040; *Bronson* v. *Schulten,* 104 U. S. 410, 415, 26 L. Ed. 797; *Aetna Life Ins. Co.* v. *Board of County Com'rs.,* 79 F. 575, 576, 25 C. C. A. 94."

In denying a petition for a writ of *habeas corpus,* the court, in *Yutz* v. *Pearman,* 33 F. 2d 906 (1929), sought to change a sentence after service actually began. The Court stated:

> "• • • The presiding judge who originally sentenced the prisoner, was without the power to modify or change the sentence on April 1, 1927, after the petitioner had actually commenced the service of the original sentence on February 5, 1927.
>
> "Under the authorities of *United States* v. *Murray,* and *Cook, Petitioner* v. *United States,* reported jointly in 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309; *Miller* v. *Snook* (D. C.) 15 F. 2d 68; *U. S.* v. *Howe* (C. C. A.) 280 F. 815, 23 A. L. R. 53; *U. S.* v. *Albrecht* (C. C. A.) 25 F. 2d 93; *Archer* v. *Snook* (D. C.) 10 F. 2d 567; *Stewart* v. *U. S.* (C. C. A.) 300 F. 769; the application of the prisoner must be denied."

In *Hynes* v. *United States,* (C. C. A. 7), 35 F. 2d 734 (1929), the Court sought to change the sentence, and it was held:

> "In criminal cases where sentence is valid and the defendant has commenced the service of the sentence, the court thereupon loses the power over the case, even during the same term. *U. S.* v. *Murray,* 275 U. S. 347, 358, 48 S. Ct. 146, 72 L. Ed. 309; Ex parte Lange, 18 Wall. 163, 168, 21 L. Ed. 872. For a general discussion see 8 Ruling Case Law Sec. 246 et seq., p. 243; 16 Corpus Juris, Sec. 2096 et seq., p. 1313. The legality of the first sentence is not in question. Unless there is statutory provisions or provision in the judgment as entered that the service shall begin at a specified time,

service begins when the prisoner is delivered into the custody of the officer at the prison where the sentence is to be served."

The rule is universal in the Federal Courts [1] and in the State Courts.[2] In the instant case, the court was not correcting a clerical error or an ambiguous sentence (*Downey* v. *U. S.* (1937), 67 App. D. C. 192, 9 F. 2d 223); nor was it reducing a sentence so as to avoid the challenge of double jeopardy (*U. S.* v. *Benz*, 1930, 282 U. S. 304, 75 L. Ed. 354, 51 S. Ct. 113; *Bradford* v. *U. S.*, 156 F. 2d 210; *Acme Poultry Corporation* v. *U. S.*, C. C. A. 4, 1944, 146 F. 2d 738). The indictment in the first case was valid (*Cromer* v. *U. S.*, 1944, 142 F. 2d 697, Cert. denied, 64 S. Ct. 1274), and jeopardy attached when the petitioner pleaded guilty and was sentenced (*Clawans* v. *Rives*, 1939, 70 App. D. C. 107, 104 F. 2d 240). After serving twenty-seven days, to again receive a similar sentence of one to three years constitutes double jeopardy in violation of the Fifth Amendment of the Constitution.

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[1] *U. S.* v. *Howe*, 1922 (C. C. A. 2), 280 F. 815.
U. S. v. *Albrecht*, 1928 (C. C. A. 7), 25 F. 2d 93.
Cisson v. *U. S.*, 1930 (C. C. A. 4), 37 F. 2d 330.
Wall v. *Aderhold, Warden*, 1931 (D. C.), 51 F. 2d 714.
U. S. v. *Davidson*, 1931 (C. C. A. 9), 50 F. 2d 517.
Rives v. *O'Hearne*, 1934 (D. C.), 73 F. 2d 985, 64 App. D. C. 48.
Buhler v. *Hill*, 1934 (D. C.), 7 F. Supp. 857.
Trant v. *U. S.*, 1937 (C. C. A. 7), 90 F. 2d 718.
Frankel v. *U. S.*, 1942 (C. C. A. 6), 131 F. 2d 756.
U. S. v. *Wright*, 1944 (D. C.), 56 F. Supp. 489.

[2] *Com.* v. *Weymouth*, 2 Allen 144.
Brown v. *Rice*, 57 Me. 56.
People v. *Duffy*, 5 Barb. (N. Y.) 205.
In re Jones, 35 Neb. 499, 53 N. W. 468.
Rupert v. *State*, 131 Pac. 713, 90 Okla. Cir. 226.
Com. v. *Foster*, 122 Mass. 317.
Pl. v. *Kustein*, 59 Cal. App. (2) 172, 138 P. (2) 780.
St. v. *Lewis*, 226 N. C. 249, 37 S. E. (2) 691.
Pl. v. *Gilligan*, 65 N. W. S. (2) 879.

By way of analogy, the Federal Courts have consistently held that a court is without power to grant probation after the service of sentence has begun.[3]

The leading case in the District of Columbia is *Rowley* v. *Welch*, (1940), 72 App. D. C. 351, wherein a prisoner was recalled within one-half hour from the cell block of the courthouse, and prior concurrent sentences were changed to consecutive sentences. An extended and able opinion in the lower court was written by Associate Justice Rutledge of this Court. The Court in part said:

> "It is conceded that if appellant had begun to serve the sentence as originally pronounced, it was beyond the court's power to make the amendment. • • • Jeopardy exists when the court's action places the prisoner in irrevocable danger of execution of the sentence. • • • We need not determine the exact point in time which fixed the ultimate limit of the court's power to make the correction. • • • It has been suggested that the limit is reached when the prisoner passes from judicial custody for purposes of trial and sentence or possible detention preliminary to it."

Although cited in petitioner's brief, the lower court did not distinguish it in the instant case, nor comment upon its principle. Apparently the Court overlooked the involuntary nature of petitioner's position in the Court vacating the sentence, and although drawn to its attention by a petition for a rehearing, did not recede from its position. The

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[3] *Archer* v. *Snook*, 1926 (D. C.), 10 F. 2d 567.
U. S. v. *Albrecht*, 1928 (C. C. A. 7), 25 F. 2d 93.
U. S. v. *Gargano*, 1928 (D. C.), 25 F. 2d 723.
Yutz v. *Pearman*, 1929 (D. C.), 33 F. 2d 906.
Moss v. *U. S.*, 1934 (C. C. A. 4), 72 F. 2d 30.
Simmons v. *U. S.*, 1937 (C. C. A. 5), 89 F. 2d 591.
U. S. v. *Craig*, 1938 (C. C. A. 9), 95 F. 2d 202.
U. S. v. *La Shagway*, 1938 (C. C. A. 9), 95 F. 2d 200.
Peden v. *Fleming* (App. D. C. 1946), 153 F. 2d 800.

three cases cited by the Court [4] in support of its opinion on the principles of former jeopardy did not involve a situation where the defendant had been actually incarcerated in the penitentiary and had begun his service of sentence, and are not controlling.

Conclusion

Since the rule announced by the lower court transcends a practice of Federal criminal law of long standing, it would seriously affect Federal commitments. It would also endanger the entry of a *nolle prosequi* by United States attorneys where inextricably associated with a plea of guilty, and in view of the fact that the court was without jurisdiction to arbitrarily vacate its sentence after actual service had begun, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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[4] *Bracey* v. *Zerbst*, 1937 (C. C. A. 10), 93 F. 2d 8.
Mirchener v. *Johnston*, 1944 (C. C. A. 9), 141 F. 2d 171.
Crapo v. *Johnson* 1944 (C. C. A. 9), 144 F. 2d 863.